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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

LOS ANGELES AND SALT LAKE RAILROAD COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, entered in the above cause on January 31, 1944, reversing a judgment of the United States District Court for the Southern District of California.

OPINIONS BELOW

The oral opinion of the district court (R. 467–516) is not reported. The opinion of the circuit court of appeals (R. 565–569) is reported in 140 F. (2d) 436.

JURISDICTION

The judgment of the circuit court of appeals was entered January 31, 1944 (R. 569). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, under two deeds executed in 1908 and 1918 conveying strips of land to the United States, the removal of oil therefrom by the United States without interfering with use of the land as a navigable waterway would cause a reverter to the grantor.

STATEMENT

Cerritos Channel, which is 600 feet wide and more than a mile long, connects the harbors of Long Beach and Los Angeles, California. The channel runs through the Wilmington Oil Field and it has been estimated that 14,000,000 barrels of oil would be produced from lands under the channel. The present suit was instituted in order to settle a controversy whether the United States or the respondent is entitled to remove that oil. The material facts may be summarized as follows:

Prior to 1908 the harbors of Long Beach and Los Angeles, California, were separated by a tidal marsh, through which ran a navigable waterway known as Cerritos Slough. See *Carver* v. *San Pedro, L. A. and S. L. R. Co.*, 151 Fed. 334 (S. D. Calif. 1906). In that year respondent, Los Ange-

les and Salt Lake Railroad Company,[1] and Los Angeles Dock & Terminal Company made a joint application to the Secretary of War. This application stated that the companies desired to straighten and deepen the channel of Cerritos Slough which was a hindrance to navigation because of its sharp turns and shallows. The companies asked permission to dredge channels particularly described, offered to dedicate described lands for the channel and sought a permit to fill the parts of the old channel which would be abandoned. (R. 153–158.)[2] At the same time the railroad sought permission to build a drawbridge across the proposed channel in place of a bridge authorized in 1906 (R. 171). In June, 1908, the Secretary of War granted the permit subject to the condition, among others, "that a strip of land 200 feet wide on each side of the center line and throughout the length of the proposed channel shall be deeded to the United States, free of cost, before the work of excavation is begun" (R. 164). The first of the two deeds here involved was thereafter executed pursuant to this condition.

The deed first recites the application for the permit and the granting thereof subject to the condition that the parties deed to the United States "a strip of land 400 feet wide" (R. 183).

[1] At that time respondent was named San Pedro, Los Angeles and Salt Lake Railroad Company (R. 3, 24).

[2] The application and the permit also related to Dominguez Creek which is not involved in the present case.

It states that respondent's board of directors had agreed to such condition and had authorized execution of the deed in performance of it (R. 184). The deed then provides (R. 184–186):

> * * * in consideration of the premises and of the granting of said permit and in pursuance of said resolution, the [Railroad Company] does hereby grant to the United States of America for the construction, maintenance and use of a free public navigable channel or waterway only, that certain parcel of land * * * described as follows: * * * it being the intention to convey a strip of land of the uniform width of four hundred (400) feet * * *.
>
> To Have and to Hold to the United States of America, as and for the purposes of a free, public, navigable channel, and subject for such purposes to the control, improvement and regulation of said grantee.
>
> Nothing herein contained, however, shall be deemed to prevent the use and occupation by the grantor, subject to approval by the United States, of the unused portions of the strip hereby conveyed until the same shall be required for the purposes of enlarging the channel; provided such use and occupation shall in no manner affect the rights herein granted; provided, further, that when the strip is required for channel purposes it shall be vacated within sixty (60) days after notice to vacate is given in writing by the grantee; and provided fur-

> ther that if the use of the said strip of land for the said granted purposes shall at any time be discontinued, or the same be abandoned or be used for any purposes other than specified herein, the estate and title hereby conveyed shall, without the necessity of a re-conveyance, revert to and vest in the grantor, its successors and assigns.

Attached to the deed were the resolutions of respondent's board of directors authorizing its execution (R. 191–196). Subsequently the trustee of a mortgage upon the railroad gave to the United States a "quit-claim deed * * * to a certain strip of land * * * conveyed by the [railroad]" (R. 198–200). The resolution of the trustee's Executive Committee authorizing this deed stated that the land involved was valued at $38,160 and the lands in the bed of the old channel which the railroad would be permitted to fill were worth $38,160 (R. 201–202).

The channel was thereafter dredged to a depth of 5 feet (R. 348–349). In 1918, in connection with projected improvements to the Los Angeles and Long Beach Harbors, it was determined to enlarge Cerritos Channel and an appropriation was made by Congress for such improvements upon condition that "local interests deed to the United States, free of cost, an additional strip of land 200 feet wide" (R. 224, 227). For this purpose, the second deed was executed so as to widen the strip to 600 feet. This deed omitted the recitals

of the earlier conveyance. The granting clause was also changed, simply providing that the railroad "does hereby grant to United States of America, Grantee, all that real property * * * described as follows" (R. 241). The habendum and the proviso clauses were substantially identical with those of the 1908 deed (R. 243). A quitclaim deed as to this land also was given to the United States by the railroad's mortgage trustee (R. 245–250).

The dredging in 1908 and 1918 was done by local interests. However, since that time the United States has incurred great expense in maintaining the channel as a navigable waterway, and is still so maintaining it. (R. 110, 348–350.) Applications have been made to the United States for oil and gas leases, and the railroad has formally protested the granting of such applications on the ground that the removal of minerals would cause a reverter of the lands deeded (R. 111–112). Because of this dispute the present action for a declaratory judgment was instituted by complaint filed January 9, 1942 (R. 2–24). The railroad answered on February 18, 1942 (R. 24–81), and thereafter evidence was taken and argument had. On November 16, 1942, the court orally announced its opinion (R. 467–516) and in March 1943 findings of fact and conclusions of law were entered (R. 108–120). The court held that the United States owned the lands in fee simple subject to the reservation that

they be used for a free, public, navigable channel (R. 119). It concluded that the production of oil therefrom without discontinuing or abandoning the navigable channel would not create a right of reversion (R. 119). The court refused to decide, or consider evidence on, whether it is practical to produce oil without interfering with navigation, for the reason that the authorization of the Secretary of War is a condition precedent to any drilling and no such authorization has been granted (R. 119–120). Judgment in conformity to these conclusions was entered (R. 120–125).

The circuit court of appeals reversed. After referring to the rules of construction which it deemed applicable it stated that the intention of the parties could, and therefore must, be ascertained from the deeds alone. That intention, it held, was that the United States should not use the land nor have a right to use it for any other purpose than a free, public, navigable channel. It declined to determine whether the deeds granted a fee simple title or merely an easement and limited its decision to holding that the United States had no right to use the channel for the production of oil or other mineral substances. (R. 565–569.)

REASONS FOR GRANTING THE WRIT

The court below, citing the rule that deeds are to be interpreted in accordance with the law of the state where the land they describe is situated, held

that interpretation of the deeds here in question was governed by California law. We do not contend that the rule is otherwise merely because the United States was the grantee under the deeds.[3] But we do contend that the court below erred in its purported application of California law to the deeds, and that its decision is probably in conflict with applicable decisions of the California courts. The question of local law thus presented is, we believe, important not only with reference to the substantial amounts involved in this case, but with reference to the frequently recurring problem of the incidence of the right to extract oil and other mineral deposits discovered on land previously granted subject to the condition of its continued use for a specified purpose.

1. The court below held that "the intention of the parties to the deeds here involved can, and

[3] *Cf. Clifford* v. *United States*, 34 C. Cls. 223, 232. The court below referred to several sections of the California Civil Code (1937) relating to interpretation of instruments. That code also provides (Sec. 755): "Real property within this state is governed by the laws of this state, except where the title is in the United States." While the meaning of this provision is not clear, we believe that, as applied to the instant case, it would exempt the United States from any unusual rules of interpretation contrary to those generally applied under the common law. However, the California Supreme Court has held that the rules of the Civil Code are not innovations but are simply statutory adoption of common law rules. *Burnett* v. *Piercy*, 149 Cal. 178, 188–189 (1906). Consequently, the rules expressed in the California Civil Code are applicable.

therefore must, be ascertained from the deeds alone" (R. 568). As indicated below (pp. 16–17), we believe that this holding in itself was not in accord with California law. But even if the intention of the parties is to be gathered from within the four corners of the deeds, without reference to the circumstances surrounding their execution, we believe that the decision is inconsistent with applicable decisions of the California courts.

The general rule is clear, that "where land is conveyed upon condition that it shall be used for a certain purpose, it is no ground of forfeiture if it is used for other purposes, provided it is also used for the purpose for which it was conveyed." 4 Thompson, *Real Property* (Perm. ed. 1940), Sec. 2104, p. 649; *The Regular Predestinarian Baptist Church* v. *Parker,* 373 Ill. 607 (1940); *Williams* v. *McKenzie,* 203 Ky. 376 (1924); *Carlsen* v. *Carter,* 377 Ill. 484 (1941); *Davis* v. *Skipper,* 125 Tex. 364 (1935); *Priddy* v. *School Dist. No. 78,* 92 Okla. 254 (1923); *Cooke* v. *Kinkead,* 179 Okla. 147 (1937); *Keaton* v. *Oklahoma City,* 187 Okla. 593 (1940); *West Pittston Borough* v. *Clear Spring Coal Co.,* 22 Pa. Dist. 190 (1907); 39 Op. A. G. 39 (1937). See Ann. (1920) 5 A. L. R. 1498; Ann. (1925) 39 A. L. R. 1340.

The court below did not question that this rule, established by the general body of decisions from various states, is also the rule in the State of California. Rather, it rested on the fact that here

the deeds specifically provided that the land conveyed should be used for the purposes of a free, public, navigable channel, and that the title conveyed should revert to the grantor if the land "shall at any time * * * be used for any purposes other than specified" (R. 568). It held that the necessity to give effect to these parts of the deeds compelled the conclusion "that the mutual intention of the parties at the time the deeds were executed was that appellee should use the land for the purposes of a free, public, navigable channel and should not use it or have the right to use it for any other purpose" (R. 568).

In so holding, we submit, the court below disregarded the fact that under the law of California language of the character relied upon is not necessarily given the effect thus attributed to it. Rather, the California courts have assimilated the situation to that contemplated by the general rule referred to above, and hold that notwithstanding such language a reverter will not be caused unless the additional uses to which the land is put are inconsistent with the specified purpose for which the land was originally conveyed.

The decisive case on this question is *City of Long Beach* v. *Marshall,* 11 Cal. (2d) 609 (1938), relied upon by the district court (R. 478) but not even mentioned in the opinion of the circuit court of appeals. In that case the state had in 1911 granted to the City of Long Beach certain

tidelands "in trust for the uses and purposes, and upon the express conditions", that "said lands shall be used by said city and by its successors, solely for the establishment, improvement and conduct of a harbor". The case involved the right of the city to drill for oil on the tide lands covered by this grant. Over objection by the state, the court held not only that the city had acquired a fee title subject to conditions, but also that the condition respecting the exclusive use of the lands did not deprive the city of the "right to drill for and extract the oil from these lands which it owns", provided that the operation was not conducted in such manner as to impede the use of the harbor.

The respondent attempts to distinguish this case on the ground that in 1937 the city charter had been amended to permit drilling for oil. But this amendent was plainly irrelevant to the construction of the original grant, which had been made sixteen years earlier.[4] The amendment did not purport to enlarge the estate originally granted, but was simply a general authorization of the production of oil from "any and all lands, including all tidelands, submerged and overflowed lands, whether filled or unfilled, and whether such lands belong to the City of Long Beach, or whether such lands be those in, or from which the City may now or hereafter have the right so to drill for * * * oil". Cal. Stat. 1937, p. 2939. Nor was it relied

[4] Cal. Civil Code (1937), Sec. 1635, provides: "All contracts, whether public or private, are to be interpreted by the same rules, except as otherwise provided by this code."

upon by the court for its conclusion; its relevance to the case was only to dissipate any question as to whether, regardless of the scope of the original grant, the city was as a matter of municipal power authorized to engage in drilling operations.[5] The decision has more recently been described as holding that "the municipality had acquired a fee simple title, had become the owner of the minerals therein, and that there was nothing in the grant which purported to deny to it the right to extract them." *Reclamation Dist. No. 1500* v. *Raub,* 58 Cal. App. (2d) 491, 495 (1943).

The respondent in its brief in the court below laid much stress on the case of *Marshall* v. *Standard Oil Co.,* 17 Cal. App. (2d) 19 (1936), as authority for its contention that under California law land granted on the condition of its use exclusively for a specified purpose cannot be used for additional purposes not inconsistent with the use specified. The case, however, supports rather than weakens our position, for the court took pains to point out that the particularly secondary use there proposed—"the erection of oil derricks and the sinking of oil wells upon a public street"—would constitute a public nuisance. Such a use would clearly have been inconsistent with the purpose of the original grant, which was that the

[5] The court said: "Hence, the ownership of the lands being once established in the city, its authority to do the acts contemplated is placed beyond question by this express charter provision."

land was "to be used exclusively for street purposes." Had the court not regarded the case as turning on the extent of the interference with the primary use, its discussion of the effects of oil drilling on a public street would have been completely unnecessary.[6]

In disregarding what we believe to be the rule of the California cases, the court below assumed itself to be bound by one particular phrase contained in the deeds, the phrase "used for any purposes other than specified herein," which the court (footnote 3) said meant "obviously, any purposes other than the purposes of a free, public, navigable channel." We submit that the cases which we have cited recognize, and that the court below erroneously disregarded, the fact that the words "other than" do not in such a context mean "to the exclusion of other uses" but mean rather "for a purpose different from that specified." Such an interpretation is supported by the *ejusdem*

[6] The doctrine thus followed in the California cases is not unique to California. The same view was adopted by the Supreme Court of Michigan in *Central Land Co.* v. *City of Grand Rapids*, 302 Mich. 105 (1942). That case presented a situation almost identical with the case now before the Court; oil production was held not to cause a reverter under a deed which granted the land "upon the express condition that [it] shall be used solely for park, highway, street, or boulevard purposes; and if any part thereof be not used for any of such purposes, or at any time cease to be used for such purpose, or at any time be used for any other purpose," it should revert to the grantor.

generis rule, which is applicable in California as a rule of construction.[7] Applying that rule to the deeds here involved, the reverter provision as a whole clearly relates to discontinuance or abandonment of the channel. Its first two clauses refer specifically to those eventualities. The general language of the third clause refers to the same general subject—the continuance of the use of the land for a channel—and embraces any other manner, not already specified, in which the land might cease to be so used. There is no warrant in the language of the deeds, or in the applicable California decisions, for construing the general words of the third clause of the reverter provision as prohibiting uses which are not inconsistent with and will not interfere with the channel use for which the land was granted.[8]

2. As shown by the oral opinion of the district court (R. 467–506), the principal issue between the parties in that court was whether, under applicable California decisions, the language of the deeds served to convey a fee title, or merely an

[7] Cal. Civil Code (1937), Sec. 1648, provides: "However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract."

[8] The single word in either deed tending to indicate an exclusion of secondary uses even though not inconsistent with channel use is the word "only" in the phrase "for the construction, maintenance and use of a free, public, navigable channel or waterway only" in the first deed. It is not clear

easement. The district judge, himself an expert in California law relating to oil lands,[9] confined his analysis of the California authorities to authorities bearing upon this question. In the absence of provisions specifically reserving to the grantor the right to drill for oil—and there is, of course, no such reservation here—the California law is, we believe, clear that the right to drill for oil follows the fee title to the land, and may be exercised by the grantee so long as the exercise of the right does not interfere with any particular use upon which the grant of the land is conditioned. This, we submit, is the necessary result of *City of Long Beach* v. *Marshall,* 11 Cal. (2d) 609 (1938), *supra,* pp. 10–12, in which the major portion of the opinion was devoted to the question whether the grant conveyed a fee. "The ownership of the lands being once established in the city," and no reservation of mineral rights appearing in the grant itself, it followed, in the court's judgment, that the city was entitled to drill for oil.

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that the court relied to any extent on this use of the word "only"; but in any event no such reliance would be justified, since the phrase in which it was contained was entirely omitted from the second deed, plainly indicating that the grantor did not regard the phrase as important, or as affecting the title conveyed.

[9] Cf. R. 412, 413, 415, 443. Prior to his appointment to the Federal bench Judge Yankwich served for eight years as judge of the Superior Court of Los Angeles County.

The court below declined to pass upon the question whether the deeds here involved conveyed a fee title or merely an easement, holding that in either event the language of the deeds would cause a reverter of the lands if they were used for oil drilling. In the light of the *Long Beach* case we submit that the action of the court below was in this respect also probably in conflict with applicable decisions of the California courts.

3. Under Point 1 above we have sought to show that in the light of applicable decisions of the California courts the deeds here involved are properly to be construed as permitting the United States to extract the underlying oil without causing a reverter of the granted lands. We believe that the deeds on their face show this to have been the intention of the parties, and that the court below was in error in holding otherwise. Even were the deeds not thus clear, we submit that our argument under Point 1 is sufficient to show that they are at the very least susceptible of a construction other than that adopted by the circuit court of appeals, and that their language leaves doubt that the parties intended any such result as reached in the decision below. This doubt is increased by reference to portions of the deeds not mentioned by the court in its opinion.[10] In such a situation the refusal of the

[10] E. g., the court made no mention of the provision requiring consent by the United States to any use by the grantor of any unused portion of the lands conveyed (see p. 21,

court below to go beyond the four corners of the deeds was in itself inconsistent with California law, which calls for a careful examination of the background facts if the intent of the parties is not clear from the terms of the documents under construction.[11]

Resort to the circumstances surrounding the execution of the deeds would have disclosed the complete absence of any basis for concluding that the parties intended to reserve to the grantor mineral rights in the lands conveyed, or to preclude the United States from enjoyment of such minerals as might be found to exist. The railroad, desiring a better channel to serve its adjoining lands, was the moving party. The Secretary

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infra), nor of the recitals of the first deed indicating an intention to convey fee title to "a strip of land," without restriction or limitation so long as it was used for channel purposes.

[11] Cal. Civil Code (1937), Sec. 1647, provides: "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates." Under Sec. 1637 of the Code this section is applicable whenever the intention of the parties is "otherwise doubtful." Cf. Cal. Code of Civil Procedure (1937), Sec. 1860, which provides as a rule of evidence that: "For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret." These rules are invoked "where upon the face of the contract itself there is doubt and the evidence is used to dispel that doubt, not by showing that the parties meant something other *than* what they said but by showing what they meant *by* what they said." *United Iron Wks.* v. *Outer H. etc. Co.*, 168 Cal. 81, 84 (1914).

of War granted its application on condition that the strip to be used for the improved channel should "be deeded to the United States, free of cost" (R. 164). Nowhere was mention made of any mineral reservation or limitation upon the grant. The railroad accepted the condition imposed by the Secretary of War, and executed the 1908 deed in performance of it. The deed itself recited at length the facts concerning the permit, and that the grant was made in performance of the condition (R. 183–184). The resolution of the railroad's board of directors authorizing execution of the deed failed to refer to any reservation of minerals (R. 191–196.)[12] The trustee of a mortgage on the railroad's property executed a quitclaim deed direct to the United States (R. 198–200), and neither the quitclaim deed nor the resolution of the trustee's executive committee (R. 201–202) made any mention of mineral reservation or of limitations on the grant.

The 1918 deed was the result of a tri-party agreement between the railroad, the City of Long

[12] As originally authorized and executed, the deed did not describe the property by metes and bounds, and permitted the continued use of the property by the grantor until required for channel purposes (R. 195). This provision had been sought by the company to enable it to keep squatters off the land (R. 266–267). At the insistence of the Department of Justice a new deed was executed containing a revised description of the land, and requiring vacation of the land by the grantor upon sixty days notice (R. 268–270).

Beach and the United States. It was contemplated that this deed would have the same effect as the 1908 deed (R. 213). Apart from the recitals, which could not appropriately be the same in the second deed as in the first, the second deed was substantially identical in form with the first. The only significant change was that, whereas the earlier deed had granted the strip of land to the United States "for the construction, maintenance and use of a free public navigable channel or waterway only" (R. 184), the quoted phrase was entirely omitted from the granting clause of the 1918 deed R. 241).[13] Again, in the correspondence and documents surrounding this transaction no reference was made to mineral reservations or to limitation of the use to which the land might be put. The trustee of a mortgage upon the railroad, at the request of the railroad, executed a quitclaim deed to the United States which contained no limitations (R. 245–249).[14] And the trustee's board of directors, in authorizing the quitclaim deed, merely referred to a conveyance "for ship channel purposes" (R. 250).

We submit that a careful reading of all the documents surrounding the execution of these

[13] The 1918 deed exactly followed the California statutory form for the conveyance of real property, Cal. Civil Code (1937), Sec. 1092.

[14] It was this deed which actually conveyed the legal title which was held by the mortgage trustee (R. 254).

deeds makes clear that the parties intended an outright transfer of the fee to the United States, subject only to reversion to the grantor when, if ever, the channel should be abandoned, and the purposes of the arrangement thereby exhausted. The district court so held, after review of all the pertinent documents. It said (R. 504):

> * * * that the intention was not to secure to the Government an easement, but the conveyance of the fee, and that the references to the uses to which it was being put are, at best, merely a condition subsequent, for the violation of which the Government might be subject to injunctive process, or other remedies, or even more drastic penalty, should the Government devote any part of the channel to the purposes which are entirely foreign or inconsistent with the use of the channel for navigation.

And with particular reference to the subject matter of this litigation, it said (R. 505):

> While no right of reversion or forfeiture is reserved to or in defendants in respect to said parcels described herein; there is a reservation or condition subsequent, and that is the use for channel purposes, the production of oil and gas from the properties conveyed to the plaintiff, without discontinuing or abandoning the use thereof as a free, public, navigable waterway in such manner as not to interfere with or impede such use, will not invest defendants with any right to invoke such condition and accomplish such reversion to it.

Not only is this the fair intendment of the deeds, read in the light of the circumstances which led to their execution; it is the only construction consistent with other general principles of law, applicable in California as elsewhere. As the court below pointed out (R. 568), under California law the whole of a contract "is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other" (Cal. Civil Code (1937), Sec. 1641); yet the court totally disregarded the provision of the deeds requiring approval by the United States of any "use and occupation by the grantor * * * of the unused portion" of the lands conveyed, and providing further that such use and occupation should "in no manner affect the rights" granted by the deeds. This provision would be meaningless and absurd [15] if the United States had no right to use the lands except for channel purposes. Furthermore, the decision of the court below leaves open the possibility that the United States, notwithstanding the restriction on its right to use the land, might be held to have acquired a fee title, including title to the underlying minerals. This is what the district court held (R. 505, 119), and we believe that under California law the deeds allow no other construction. The decision there-

[15] Section 1638 of the Civil Code provides: "The language of a contract is to govern its interpretation, if the language is clear and explicit, and *does not involve an absurdity.*" [Italics supplied.]

fore sanctions the existence of a situation in which the owner of the fee may not extract his own minerals, nor make any other use of his land save for a designated purpose even though such other use would not interfere with such purpose. Such a holding would mean that the parties were assumed to have intended to freeze the minerals in place, even though no benefit could accrue to the railroad from such restriction until some remote and indeterminate time in the future. The policy of the law, as expressed in the rule against perpetuities, views such restrictions with disfavor. See Cal. Civil Code (1937), Secs. 715–718; *Estate of Fair,* 132 Cal. 523 (1901). And the policy of the law equally frowns upon conditions involving forfeiture, and demands an interpretation which if possible will avoid that result. Cal. Civil Code (1937), Sec. 1442.

The conditions in the deeds were not sought by the United States, but were insisted upon by the respondent (R. 269), and the reverter provision was in language proposed by the respondent (R. 194–195). The respondent, therefore, is "the party who caused the uncertainty to exist," against whom the language of the deeds should under Section 1654 of the Civil Code "be interpreted most strongly." Moreover, at the time of the execution of the 1908 deed there had recently been decided the case of *Los Angeles University* v. *Swarth,* 107 Fed. 798 (C. C. A. 9, 1901), dealing with the right of a grantor to restrain Los

Angeles University from extracting oil from land which had been conveyed subject to the "express condition" that it should be "used exclusively as a part of the campus of said university". Notwithstanding the reference to "express condition," the court had treated the restriction as a covenant, saying: "Conditions are not favored in law, and are construed strictly, because they tend to destroy estates" (p. 803); and the court had further held that such a covenant, as distinguished from a condition, was not enforceable by the grantor. That decision, construing a California deed, cannot well have escaped the attention of skilled railroad counsel, who must have known that deeds are to be construed "according to the laws in force at the time they were executed" (*Burnett* v. *Piercy,* 149 Cal. 178, 189 (1906)), and who must have likewise known that deeds to the Federal Government would be interpreted by the Federal courts. If a prohibition of secondary uses or a reservation of minerals had been intended, they would have been particularly careful in view of the *Swarth* decision to express such intention in unmistakable language. Cf. *Las Posas Water Co.* v. *Ventura County,* 97 Cal. App. 296 (1929); *Cooper* v. *Selig,* 48 Cal. App. 228 (1920).

4. As noted in Point 2 above (pp. 15–16), we believe that the court below disregarded California law in declining to decide whether the deeds conveyed fee title or merely granted an easement. De-

termination of this question is of great importance to the Government for practical purposes even though the decision of the court below should stand. For assuming that the Government may not recover the oil because to do so would cause a reverter, the respondent also is precluded from so doing if the deeds convey a fee to the Government. Doubtless contractual arrangements for recovery of the oil could be effected, but negotiations can obviously not be satisfactorily conducted without a judicial determination as to whether the Government or the respondent owns the minerals. In view of the large amount of oil involved, and the urgent present-day need to utilize all available sources of supply, it is important that "the rights, duties and obligations of the parties hereto arising from such conveyances" be adjudicated, as asked in the complaint (R. 8).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the court below has decided an important question of California law in a manner inconsistent with applicable decisions of the California courts, and that the decision should therefore be reviewed by this Court on writ of certiorari.

CHARLES FAHY,
Solicitor General.

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IN THE

Supreme Court of the United States

October Term, 1943.

No. 949.

UNITED STATES OF AMERICA,

Petitioner,

vs.

LOS ANGELES & SALT LAKE RAILROAD COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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UNITED STATES OF AMERICA,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

QUESTION PRESENTED.

Petitioner states (p. 2) that the question presented is whether, under the two deeds executed in 1908 and 1918, the removal of oil without interfering with the use of the land as a navigable waterway would cause a reverter to the grantor.

This (with all respect) is an incorrect statement of the true question involved. That question is not whether the removal of oil would cause a reverter to the grantor, but whether, under any circumstances, the United States has the right by virtue of these two deeds to use said lands for the production of oil.

The decision of the Circuit Court was directed solely to this issue and was that, irrespective of questions of

title or reverter, the United States has no right to use the land for any purpose other than a public channel, and hence no right to produce oil therefrom. It based this ruling not on any technical application of the reverter clauses, but upon the intention of the parties as gathered from the deeds taken as a whole and giving effect "to every part thereof." What petitioner seeks is to have this Court find that the parties had a different intent from that found by the Circuit Court.

THE PETITION FAILS TO STATE FACTS JUSTIFYING THE ISSUANCE OF CERTIORARI HEREIN.

The petition is apparently predicated upon the ground that the Circuit Court "has decided an important question of local law in a way probably in conflict with applicable local decisions." To justify the issuance of certiorari on this ground petitioner must show (a) that a controversy exists over an important question of state law, and (b) that the Circuit Court's decision is probably in conflict with decisions of the state courts upon that question. Neither of these situations exist in the present case.

The Decision Is Not in Conflict With Local Law.

The question at issue herein necessarily turned upon the intent of the parties as expressed in the deeds. To ascertain this intent the Circuit Court applied the rules of the California Civil Code for the interpretation of written instruments. There was no controversy in the court below as to what are the correct rules for the interpretation of written instruments, and there is no doubt that the Circuit Court's statement thereof is in harmony with the decisions of the state courts.

The first of those rules is that the instrument* must be construed so as to effectuate the mutual intent of the parties so far as the same is ascertainable and lawful. [Calif. Civ. Code, §1636; R. 567.] The second rule is that "the intention of the parties is to be ascertained from the writing alone, if possible; . . ." [*Id.* §1639; R. 567.] The third rule is that "the whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." [*Id.* §1641; R. 568.] The Circuit Court obeyed and followed those rules implicitly. It found that it was possible to ascertain the intention of the parties from the writing alone and accordingly it was unnecessary to refer to or discuss the evidence of extraneous circumstances. The conclusion of the court was that the parties meant just what they said.

Counsel for petitioner has apparently recognized that the decision is not actually in conflict with any local law. This is indicated by the fact that most of the petition is devoted to the claim (p. 8) that "the court below erred in its purported application of California law to the deeds." Thus the real complaint is not that the Circuit Court decided any question of California law in conflict with local decisions, but that it erred in determining which of two different rules of California law (neither of which has been the subject of controversy herein) should be applied to the particular facts of this case. (See pp. 6 and 7, *infra.*)

It is of course true that under California law, if the court is in doubt as to the intention of the parties it may resort to extraneous evidence to aid in the interpretation

*In California grants are to be interpreted as contracts, *Civil Code,* §1066.

of the instrument. (Calif. Civ. Code, §§1637, 1647; a
C. C. P., §1860.) But "This rule of evidence is invok
and employed only in cases where upon the face of the co
tract there is doubt . . ." (*United Iron Works
Outer Harbor, etc. Co.,* 168 Cal. 81, 84 (1914.)*

The Circuit Court found that upon the face of the co
tract there was no doubt as to the intention of the parti
Hence it was unnecessary to resort to other eviden
There is no conflict with local decisions in this ruli
But petitioner feels that the court should have had dou
as to what the parties intended by the language used
the contract and hence should have considered other e
dence and arrived at a different conclusion. On t
ground petitioner asks that this Court, using the sa
rules of construction, find that the parties had a differ
intention from that found by the Circuit Court. In oth
words, the controversy which petitioner asks this Court
determine involves no conflict between the Circuit Cou
decision and the local applicable law, but relates solely
the peculiar facts of this case.

It follows that even if the Circuit Court erred (wh
we deny) in the application of California law to
particular facts of this case, such error is not the ki
of error customarily reviewed by this Court. Howev
we recognize that this Court's discretion is not control
by the terms of Rule 38, hence we shall proceed to answ
the claim that the Court erred in the proper applicat
of California rules of construction.

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*A partial quotation from this case appears in the footnote
page 17 of the petition, but petitioner has omitted the import
words stating that the rule is invoked only in cases of doubt.

The California Law Governing the Construction of Written Instruments Was Properly Applied to These Deeds.

In determining whether the Circuit Court was justified in finding that the intent of the parties was ascertainable from the deeds alone, it is essential to keep in mind what the deeds really say. We make this rather obvious comment because the only way in which the trial court could find that the deeds permit the government to remove the oil was to distort and revise, and, in effect, rewrite the deeds, and also because all of the decisions relied upon by petitioner to show that the California law was improperly applied involved deeds which lacked the controlling provisions of the deeds herein.

The extent to which it was necessary to distort and change the language of the deeds, in order to find for petitioner is illustrated by the following parallel columns:

1908 Deed	Judgment Paragraph I [R. 121]
". . . [Grantor] does hereby grant to the United States of America for the construction, maintenance and use of a free public navigable channel or waterway *only*,* that certain parcel of land . . ."	"That the United States of America is the owner of the lands conveyed to it . . . in fee simple, absolute *subject only* to the reservation that such property be used for a free, public, navigable channel."

*All emphasis here and elsewhere herein is added.

1908 AND 1918 DEEDS	FINDING VIII [R. 112]
"To have and to hold . . . as and for the purposes of a free, public, navigable channel, . . .	"The Court finds that the two Deeds contained conditions subsequent with provisions for a reverter in the event the plaintiff shall discontinue or abandon the use of the property granted as a free, public navigable waterway, or in the event that plaintiff shall so use the property granted as to substantially interfere with or impede such use, and that in such event the defendant, or its successor in interest, may invoke such condition and accomplish such reversion."
". . . if the use of the said strip of land for the said granted purposes shall at any time be discontinued, or the same be abandoned *or be used for any purposes other than specified herein,* the estate and title hereby conveyed shall, without the necessity of a reconveyance, revert to and vest in the grantor, its successors and assigns."	(Note the omission of the limitation against the use "for any purposes other than specified."

Petitioner endeavors to justify the elimination from the deeds of the express words prohibiting the use of the land for any purposes other than those specified by resort to a so-called "general rule" which is stated as follows (Pet. p. 9):

> "where land is conveyed upon condition that it shall be used for a certain purpose, it is no ground for forfeiture if it is used for other purposes, provided it is also used for the purpose for which it was conveyed."

We do not question the correctness of this statement, but obviously it does not apply to the deeds here in ques-

tion and by implication it misquotes them. There is a vital difference between (a) a deed conveying land upon condition that it shall be used for a certain purpose, with no provision against the use for other purposes, and (b) a deed which provides that land shall be used for a certain purpose and shall not be used for any other purpose. The general rule relied on by petitioner relates to deeds of the former kind, but these are not the deeds before the Court. The deeds before the Court are governed by another rule which is concisely set forth by the California Supreme Court in the case of *Los Angeles Investment Co. v. Gary*, 181 Cal. 680, at p. 683, as follows:

> "Conditions so extreme as to restrain the use to a single specified purpose are not uncommon and so far as we are aware have been uniformly enforced, . . ."

Government counsel have, throughout this entire case, closed their eyes to the obvious distinction between these two types of deed and the two contrasting rules above set forth. They cite (p. 9) eight cases from other states as authority in support of this so-called "general rule." Not one of these cases refers to a deed which contains an express condition against the use for any other purpose than the one specified, with provision for reverter in the event of such other use. Furthermore, in five of these decisions it was held that the *absence* of such a prohibition against other uses was a determining factor. The very cases, therefore, upon which petitioner relies support our claim that where there *is* an express prohibition against other uses, and especially if that prohibition is reinforced by a provision for reverter, such prohibition must be enforced according to its terms.

Petitioner attempts, however, to show that this so-called "general rule" has been adopted in California as a rule applicable to deeds which *do* contain provisions prohibiting other uses. Petitioner's statement in that regard is as follows (p. 10):

> ". . . the California courts have assimilated the situation to that contemplated by the general rule referred to above, and hold that notwithstanding such language a reverter will not be caused unless the additional uses to which the land is put are inconsistent with the specified purpose for which the land was originally conveyed."

By this argument petitioner in effect says that a rule applying only to deeds which contain no provision against use for any purpose other than the ones specified has been adopted in California as the rule applying to deeds which do contain a specific provision against use for any purposes other than specified. If this were true then it would be impossible in California to make a deed which effectively restricts the use of land to one specified purpose. In other words, counsel urges that the provision of the deeds herein which provides that the estate and title conveyed shall revert to respondent if the land "shall at any time . . . be used for any purposes other than specified," must, under California law, be entirely disregarded. The many California cases cited in the Circuit Courts' opinion demonstrate that this is a misstatement of the California law, and, indeed, of the general common law governing the construction of written instruments. No California case holds that such a provision in a deed may be disregarded.

The only California decision which petitioner cites in support of the so-called general rule is *City of Long Beach v. Marshall,* 11 Cal. (2d) 609. But, as we have shown,

this "general rule" has no application to the deeds herein. Furthermore, the *Long Beach* case does not hold or even intimate that a condition in a deed restricting the use of land to a specified purpose, with provision for reverter if used for any other purpose, is ineffective or may be disregarded.

The case involved a legislative grant of tidelands from the State of California to the City of Long Beach. The language of the grant was materially different from the deeds herein. There was no provision for reverter and the uses and purposes of the grant were much broader. The difference in the wording* is so great that the *Long Beach* case could not be considered as authority in the present case.

Two questions were considered by the court: (a) whether the legislative grant conveyed the fee or an easement, and (b) if the fee was conveyed, whether the limitations of use were such as to prevent the city from taking the oil. The attorney general contended in behalf of the state "that there was no conveyance of the fee, and that the city received only the governmental power of administration of the lands, together with an easement or right to use them for specified purposes." (11 Cal. (2d) 614.) The city contended (a) that the grant conveyed the fee, and (b) that the limitations of use, if they should be deemed to exclude drilling for oil, had been waived and released by the charter amendment of 1937.

The court decided both questions in favor of the city's contentions. The opinion is devoted almost entirely to the question of fee or easement. The conclusion that a fee

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*See Appendix "B," p. 16.

was conveyed was predicated primarily upon the following particular wording of the grant:

> "There is hereby granted to the City of Long Beach . . . all the right, title and interest of the State of California . . . in and to all the tidelands . . ."

The court held:

> "The language granting 'all right, title and interest' clearly indicates an intent to transfer the state's fee title." (11 Cal. (2d) 616.)

(There is no similar or comparable language in the deeds involved herein.) The court then discussed the legislative and judicial history of the numerous similar tideland grants to California cities, and pointed out that it strongly confirms the conclusion that those grants were intended to convey the fee. (There is, of course, no similar or comparable feature in the present case.) Having thus determined that the grant conveyed the fee, the court disposed of the remaining question of the city's right to drill and take the oil, by pointing out in a brief paragraph (*id.*, p. 620), that this question was concluded by the charter amendment of 1937, saying:

> "The final question is whether the city has the right to drill for and extract the oil from these lands which it owns. Nothing in the grant purports to reserve to the state or to deny to the municipality the minerals or the right to extract them. Moreover, the charter amendment, section 229x, approved by the legislature in 1937, expressly and unequivocally empowers the city to drill, develop, take and dispose of oil on tidelands owned by it. Hence, the ownership of the lands being once established in the city, its authority to do the acts contemplated is placed beyond question by this express charter provision."

In California, an act of the legislature approving a municipal charter, or an amendment thereto, is a law of the state, of equal force and effect with other statutes. Like other statutes, it operates to repeal all prior laws inconsistent therewith. (*City of Oakland v. Hogan,* 41 Cal. App. (2d) 333, 342 (1940); *C. J. Kubach Co. v. McGuire,* 199 Cal. 215, 217 (1926).) Therefore, the charter amendment of 1937 settled the question of the city's right to take the oil and it was unnecessary to determine the effect of the limitations in the original grant, that question having been rendered *moot* by the charter amendment. No waiver or release by the Railroad Co. comparable to the act of the state approving the Long Beach charter amendment exists in the present case.

It is clear, therefore, that the *Long Beach* case in no way supports the claim that the rule applicable to deeds containing *no* prohibition against other uses has been "assimilated" in California as controlling the interpretation of deeds which *do* contain such a provision. As noted in the Circuit Court's opinion, there are many California decisions holding that the right to annex such exclusionary restrictions to a conveyance of property "is a necessary incident of the right to own and convey," and such conditions when clearly expressed have always been enforced. Prominent among these cases is *Pavkovich v. Southern Pacific R. R. Co.,* 150 Cal. 39 (1906), where a condition with a reverter very similar to the one contained in the two deeds here before the Court was upheld and enforced.

Counsel assert (p. 13, footnote) that in the case of *Central Land Co. v. City of Grand Rapids,* 302 Mich. 105, 4 N. W. (2d) 485, the Michigan court adopted the "same

doctrine followed in the California cases." With all respect we challenge the correctness of this statement. There was a strong dissent in the Michigan case, in which it was pointed out that the decision was squarely in conflict with the California rule. This dissent cited *Marshall v. Standard Oil Co.,* 17 Cal. App. (2d) 19, as evidence of what the law is in California and what it ought to be in Michigan. Furthermore, the Michigan decision was predicated largely upon a peculiar Michigan statute quoted in the decision (4 N. W. (2d) at p. 490) which is directly contrary to the provisions of Sections 1683 and 1066, California Civil Code.

The case of *Marshall v. Standard Oil,* 17 Cal. App. (2d) 19 (1936), involved a deed to the City of Huntington Beach with a covenant that the land "is to be used exclusively for street purposes, . . ." There was no condition with reverter as in the deeds herein. The case did not, as counsel asserts (p. 13), turn on the question of the extent to which oil drilling would interfere with the use for street purposes. On the contrary, the court specifically stated that "the real question to be determined in this cause is whether the premises involved were accepted by the City of Huntington Beach upon trust for the purposes specified . . ." (17 Cal. App. (2d), p. 22.) On this question the court definitely held (without regard to any alleged interference) that a conveyance for a special and exclusive purpose imposes a trust on the part of the grantee which must be enforced according to its terms.* This case is squarely in point with regard to the language in the granting part of the 1908 deed, *i. e.,* "grant . . . for the construction, maintenance and use of a free, public navigable channel or waterway only," and holds that such

language effectively prohibits the use of the lands for the production of oil.

Furthermore, it should be borne in mind that the deeds in the case at bar present a much stronger case for the prohibition of drilling than the deed in the *Marshall* case, for, as above stated, that deed contained no provision for reverter. The existence of a reverter provision constitutes the strongest possible evidence of intent that the land should *not* be used for any purpose other than specified.

The Rule of Ejusdem Generis Has No Application.

In a further effort to erase from the deeds the express prohibition against the use for any purpose other than specified, petitioner asserts (pp. 13 and 14) that the *ejusdem generis* rule should be applied. If this argument were accepted, it would mean that when the parties agreed that the land should be used for no other purpose than the one specified they meant the same thing as they did when they agreed that the land should revert if the channel should be abandoned or discontinued. There is no place in these deeds for the application of the *ejusdem generis* rule. Furthermore, such a rule if applied in this case, would be squarely contrary to the provisions of §1641, Civil Code, which requires that, if reasonably practicable, effect must be given to every part of the deed. *Ejusdem generis* is not a mandatory rule nor even a rule of law. (*City of Los Angeles v. Superior Court,* 2 Cal. (2d) 138, 140 (1934).) Even if it were applicable here it must yield to the statute.

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*The question of interference was entirely incidental to the main issue and arose primarily in connection with the claim of abutting property owners that drilling would interfere with their access to the street.

The extent to which the California courts have gone giving effect to every part of a deed is illustrated in *Rosecrans v. Pacific Electric Ry. Co.*, 21 Cal. (2d) 602 (1943). In this case the court construed a deed containing a condition subsequent requiring that the grantee "shall establish and maintain" certain railway service. The Supreme Court of California held (21 Cal. (2d) at 606),

> "that the specified passenger service must be both established and maintained. Effect should be given to both of those words."

The service had been established and maintained for years, nevertheless the court enforced a reverter on the ground that the cessation of service was a breach of the condition requiring that service be "maintained."

This case strongly supports the Circuit Court's decision and completely disposes of the argument that distinct and independent events of reverter can be treated as all meaning the same thing.

The Circuit Court Considered Every Part of Each Deed, and its Decision as to the Intent of the Parties Is Supported by All the Terms and Provisions of the Deeds.

Petitioner asserts (p. 13) that "the court assumed itself bound by one particular phrase contained in the deeds, the phrase 'used for any purposes other than specified herein,' . . ." There were two good reasons why the court should have made special mention of this phrase: one, that the trial court had completely ignored it and refused to give it any effect whatever; the other, that this phrase furnishes the strongest possible evidence of the intention of the parties to limit the use of the land to channel purposes only. But the suggestion that the Circuit C

based its decision on this one phrase without considering other parts of the deeds is negatived by the decision itself. The court specifically stated that effect must be given to all parts of the deeds and, among other things, said:

> "When effect is given to every part of each deed, it is clear that the mutual intention of the parties at the time the deeds were executed was that appellee should use the land for the purposes of a free, public, navigable channel and should not use it or have the right to use it for any other purpose. That intention was lawful. Therefore, the deeds must be so interpreted as to give it effect." [R. 568.]

This disposes also of the assertion (p. 21) that the court "totally disregarded the provisions of the deeds requiring approval of the United States of any 'use and occupation by the grantor . . . of the unused portion' of the lands conveyed."

But even if it could be assumed that the court disregarded this clause, there is nothing in it which is inconsistent with the intention of the parties as found by the Circuit Court, nor is the clause "meaningless and absurd" (as counsel asserts) if the United States has no right to use the land for other than channel purposes. This clause does not confer upon the grantee the right to use the land for any purposes other than a channel nor does in in any way enlarge grantee's right to the use of the land. On the contrary, it reserves to the Railroad Company the right to use and occupy the land for any purpose until it is required for the purpose of "enlarging the channel." This emphasizes the fact that the *only use* the United

States can make of these lands is for channel purposes. If the channel had never been enlarged the unused portion would still be subject to the exclusive use and possession of the Railroad Company. The United States could not have taken it for oil development but only for enlarging the channel.

The provision that any use by the grantor of the portion not immediately needed for a channel must be *approved* by the United States merely protected the grantee against uses by the Railroad Company which might encroach upon the channel.

There are other provisions of the deeds, not specifically mentioned, which strongly support the Court's decision. One of these is the clause (in both deeds) providing that the United States shall have and hold the land "*as* and *for* the purposes of a free public navigable channel, and subject *for such purposes* to the control, improvement and regulation of said grantor." This clause not only limits the estate conveyed but also limits the government's right of control and regulation to the one purpose of a channel. If the grantee's right to use the land had been unlimited there would have been no need to provide that the United States should have the power of "control" and "regulation" for channel purposes. It is this clause, and not the one referred to by petitioner, that would be meaningless and absurd if the parties had intended that the land might be used for any purposes other than a channel.

Mention might also be made of the words "*rights* herein granted" and "granted *purposes*," which appear in both deeds. These words give additional emphasis to the intent of the parties to limit the use to channel purposes, as found by the Circuit Court. It is apparent that a discussion of

other parts of the deeds would not have changed the result.

In the footnote to page 14 of the petition reference is made to the phrase in the granting clause of the 1908 deed "for the construction, maintenance and use of a free, public, navigable channel or waterway only." Petitioner concedes that this indicates the exclusion of secondary uses, but argues that no effect can be attributed to it because it was omitted from the second deed. Obviously, the clause *does* indicate an intent to exclude any uses other than a channel or waterway. But since the same intent is even more strongly evidenced by the reverter clauses which are alike in both deeds, the Court did not find it necessary to discuss this clause in the 1908 deed. For this reason it is unnecessary for us to answer petitioner's argument that no reliance on the clause would have been justified because of its omission from the 1918 deed. But we do not concede that any such result follows. On the contrary, if it be deemed pertinent to consider the surrounding circumstances, such consideration would show that the second deed was intended by both parties to be identical with and to contain the same limitations as the first deed. [See Appendix, p. 11, *seq.*]

The Intent of the Parties Being to Limit the Use to Channel Purposes Only, a Mineral Reservation Would Have Been Superfluous and Unnecessary.

Petitioner puts much emphasis upon the fact that the deeds contain no express "mineral reservation." (Pet. pp. 15, 17, 18 and 19.) This argument begs the whole question. If, as the Circuit Court found, the parties intended to restrict the use of the land to the one purpose of a channel, a mineral reservation would have been wholly

superfluous. The fact is that these deeds go far beyond the mere reservation of oil rights and expressly prohibit *all* uses except the use for a public channel. The grantor was not seeking merely to reserve minerals, but was putting it beyond the power of the grantee to make any use of the property except the one use which both parties then had in view.

In this connection the petitioner states (pp. 22, 23) that the case of *Los Angeles University v. Swarth*, 107 Fed. 798, held "that such a covenant, as distinguished from a condition, was not enforceable by the grantor." We respectfully submit that this is an incomplete and misleading statement of what the court held. Its conclusion that the covenant was not enforceable by the grantor was expressly predicated upon the ground that the grantor had retained no interest in the premises in favor of which the covenant was created and, therefore, was a mere intruder having no standing in equity to enforce the covenant. This, the court said, was "the precise question" in the case. (p. 805.) In the case at bar it is admitted that the grantor owns the land adjoining the channel on both sides, for the benefit of which the covenants and conditions in the deeds were created. It therefore has a direct interest in the enforcement of these covenants and conditions according to their terms. Failure to enforce them would be squarely contrary to the *Swarth* case. Furthermore, the statement in the petition that "notwithstanding the reference to 'express condition' the court [in the *Swarth* case] had treated the restriction as a covenant," is not in accord with the facts of that case. The original deeds contained both a covenant and a condition subsequent with right of reverter, but expressly provided that the right of reverter should not exist after a specified

date. The action was brought subsequent to this date and the condition had, therefore, expired and the grant had become absolute, subject only to the covenant which, as above stated, was unenforceable because the grantor had parted with all of the lands for the benefit of which the covenant had been made. There was nothing whatever in that case, nor was there any other reason, which would have caused railroad counsel, who were preparing a deed which was to convey a right to the use of land for purposes of a channel *only*, and to revert if used for any other purpose, to include in such a deed a reservation of minerals. It is more likely that they had in mind *Pavkovich v. So. Pac. Co.*, 150 Cal. 39 (1906), which contains a condition very similar to those in the deeds herein and is authority upon California law.

The Real Issue Herein Was Whether the Government Has the Right to Extract the Oil Underlying the Channel. The Court Was Not Required to Decide Other Questions.

It is not the fact, as asserted by petitioner (p. 14), that the principal issue in the District Court was whether the deeds conveyed the fee or an easement. This question was argued in the courts below, not as an ultimate issue in the case, but only as it might aid in the determination of the ultimate question whether the petitioner has the right to take the oil underlying the channel. That, as shown by paragraphs VII and IX of the complaint [R. 6, 7] was the one question, and the only one, which petitioner needed to have answered by the court.

Petitioner alleged that it had received applications for federal oil leases on this land and that respondent had protested, on the ground that the granting thereof "would defeat the purposes for which said two deeds were de-

livered and would thereby adversely affect the right, title and interest" of respondent. [R. 6.] Petitioner traversed this assertion by the allegation "That the defendant has no right, title or interest in the lands . . . which would be 'adversely affected,' infringed or impaired by the extraction by plaintiff of oil and gas . . ." [R. 7.] Thus the issue was definitely framed; to-wit, Has the petitioner the right under the deeds to extract the oil and gas? That is the only question which need be answered for all practical purposes of this case. It was answered directly and unequivocally by the Circuit Court. That answer entirely disposes of this case. Petitioner, having no right to take the oil and gas, has no justiciable interest in the question who owns the fee. That question is *moot,* in so far as petitioner is concerned. It is the law in California, as elsewhere, that "An appellate court will not review questions which are *moot* and which are only of academic importance." This rule applies *a fortiori* where such review is sought by a party having no substantial interest therein. (*Keefer v. Keefer,* 31 Cal. App. (2d) 335, 337 (1939).)

It follows that there is no basis for the claim of petitioner (p. 16) that the refusal of the Circuit Court to pass upon the question whether the deeds conveyed a fee or easement was probably in conflict with local decisions. Furthermore, the case of *Marshall v. Standard Oil Co., supra,* is direct authority against this claim. In that case the question whether the deed conveyed a fee or easement was extensively argued in the briefs. The court, as in the present case, declined to pass on this issue, saying (p. 25):

> "We do not need to give any attention to whether the instrument involved did or did not amount to a

dedication, nor does it seem to us material to dwell upon the question as to whether the City of Huntington Beach owns all the lands, minerals, etc. contained under the surface within the boundaries set forth in the deed. If the right to the premises or title to the premises was accepted upon trust, the right to have that trust enforced is vested in the grantor."

The above California cases fully support the Circuit Court's ruling that it was unnecessary to decide whether the deeds convey a fee or an easement.

Petitioner has failed completely to show that the California law was not properly applied to the deeds in question. On the contrary, all the California cases which are in any way pertinent fully support the Circuit Court's decision.

Petitioner urges (footnote, p. 15) that in considering California law special consideration should be accorded to the decision of the District Judge because he served for eight years on the Superior Court of Los Angeles County. With all respect to the District Judge, we feel it is a fair assumption that the three circuit judges who concurred in this decision have some knowledge of California law, especially in view of the fact that one of them was for many years a Justice of the Supreme Court of California, and another had practiced law in that state thirty-eight years.

Resort to Surrounding Circumstances Would Not Have Changed the Result.

Petitioner asserts (p. 17) that resort to surrounding circumstances would have disclosed the complete absence of any intention "to preclude the United States from the enjoyment of such minerals as might be found to exist";

and, again (p. 20), that the documents surrounding the execution of the deeds make it clear that the parties "intended an outright transfer of the fee to the United States." Petitioner's recital of the surrounding circumstances, which petitioner states would lead to these conclusions, is, with all respect, both incomplete and inaccurate. To answer these assertions would require a detailed analysis of a large amount of documentary evidence. We do not believe such an analysis is called for here. The decision of the Circuit Court that resort to extraneous evidence is unnecessary is fully in accord with California law. A detailed analysis of such evidence would, therefore, be irrelevant to the question now before the Court, *i. e.,* whether a writ of certiorari should be granted. However, for the information of this Court, if it so desires, we include as an appendix hereto an analysis of the more important portions of this evidence which, we contend, shows beyond question that if the Circuit Court had found it necessary to resort to surrounding circumstances to determine the intent of the parties, the result would have been the same. Indeed, it was and is our contention that the surrounding circumstances show definitely and almost conclusively that it was the intention of the parties that the deeds should convey only an easement of use for the purposes of a free, public, navigable channel only.

Finally, it should be borne in mind that the Circuit Court was informed as to all surrounding circumstances, the evidence thereof being set forth in the record and discussed fully in the briefs.

THERE IS NO PUBLIC INTEREST WHICH REQUIRES DETERMINATION OF THE QUESTION WHETHER THE FEE OR AN EASEMENT WAS CONVEYED.

Under Point 4 (p. 23) counsel urges that it "is of great importance to the Government for practical purposes . . ." to have this question determined. He asserts that, if the fee passed, both parties are precluded by this decision from recovering the oil, in the face of "the urgent present-day need to use all available sources of supply . . ." This result will not follow.

Admittedly, there are valuable deposits of oil and gas underlying the channel. (But the fantastic "estimate" (p. 2) of "14,000,000 barrels" of recoverable oil is without the slightest support in the record.) It does not follow, however, that these deposits will be lost to the world if this decision stands,— even though it be assumed (certainly not conceded) that petitioner owns the fee. Ownership of oil and gas in place is not the rule of property in California. It is now settled law in California that "if an adjoining owner drills his own land and taps a deposit of oil or gas, extending under his neighbor's field so that it comes into his well, it is his property." (*People v. Associated Oil Co.*, 211 Cal. 93, 101 (1930); *Callahan v. Martin*, 3 Cal. (2d) 110, 117-8 (1935).) The Court knows judicially that oil and gas are fugitive substances, capable of flowing from place to place, and hence are susceptible of being drawn off by wells from any point, provided they penetrate into the reservoir. (*Ohio v. Indiana* (1899), 170 U.S. 190-201.)

That the oil and gas underlying the Cerritos Channel can be withdrawn through wells bottomed in the adjoining lands along the channel is confirmed by the uncontradicted testimony of William Reinhardt. (R. 449, 450, 457.) He testified that respondent's well-spacing program in this field is on a ten (10) acre basis, with the Channel area a part of that spacing program. This means that its wells are bottomed approximately 660 feet apart so as to effectively drain the entire area, including the Cerritos Channel area, which is only 600 feet wide. Thus, no waste of natural resources can result from this judgment, the oil and gas will not be frozen in place, as petitioner contends (p. 22), nor will respondent be precluded from recovery as contended (p. 24), and there need be no occasion for the "negotiations" referred to by petitioner (p. 24).

It is but just that respondent should have the benefit of this oil and gas, for, as the Court held in *Pavkovich v. So. Pac., supra,* it must be assumed that the limitations and conditions contained in these deeds were agreed upon and included in the deeds for the very purpose of protecting the grantor against just such exploitation as is now proposed and hence the grantee is in no position to complain of their enforcement. Further specific authority for the justice of respondent's position in this regard is found in *Marshall v. Standard Oil Co., supra,* where the court held that a covenant not nearly so strong as in the present case must be construed in the light of the fact "that the grantor owned the premises on both sides of the right of way conveyed, and therefore limited the purpose for which the premises could be used, in view of the fact that oil wells sunk on the narrow strip would drain oil from the

adjoining premises owned by the grantor." (17 Cal. App. (2d) p. 28.)

Furthermore, the only consideration given by petitioner for the deeds was the grant of the permit to dredge Cerritos Channel and to fill up Cerritos Slough, which was narrow, tortuous and shallow—navigable in fact only by very small boats at periods of high tide. In return therefor petitioner obtained a free, public, navigable channel which is wide and deep and straight, and which was dredged, redredged and improved over a period of twenty-two years at the sole cost of this respondent and the City of Long Beach. [R. 348-350.]

There is nothing at stake in this action except dollars. The real question at issue is who shall get the money proceeds of the oil and gas. The fact (if it be the fact) that the amount involved is large, does not make this "a question of general importance," so as to require the interposition of this Court.

As to petitioner's contention (p. 8) that the deeds herein present a frequently recurring problem, it is wholly improbable that a decision as to the interpretation of the particular language of the deeds herein (and surrounding circumstances, if those should be considered) would settle the problem of the interpretation of other written instruments which, in the nature of things, would almost certainly contain different language and be surrounded by different circumstances.

We could almost believe that the former Chief Justice had this identical case in view when he said:

> "But we find that a very large proportion of the applications [for certiorari] are without substantial grounds. . . . For example, we have many applications where the questions raised are those *relating to particular contracts* or transactions and turn upon the facts of the particular case, and there is no controversy of importance with respect to legal principles . . . It is not the importance of the parties or the amount involved that is controlling, but the need of securing harmony of decision and the appropriate settlement of questions of *general importance* so that the system of federal justice may be appropriately administered."*

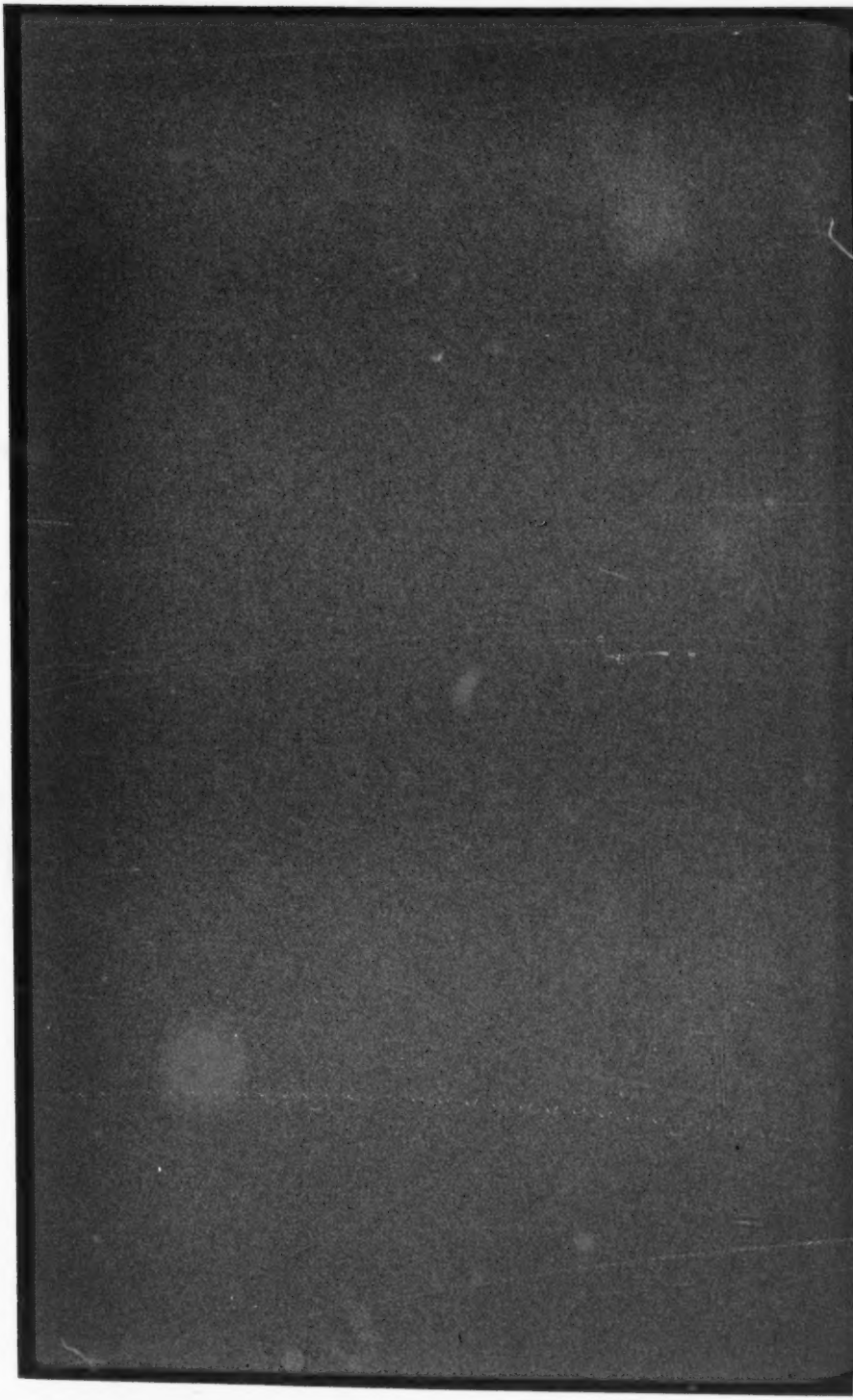
Respectfully submitted,

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*From an address by Mr. Chief Justice Hughes before the American Law Institute, reported in Vol. XX, American Bar Association Journal, p. 341.



APPENDIX "A."

Evidence of Surrounding Circumstances Supports Circuit Court's Decision That the Parties Intended to Restrict the Use of the Land to Channel Purposes Only.

The following summary is in answer to the claim advanced by petitioner (p. 17) that resort to the circumstances surrounding the execution of the deeds would have disclosed "the complete absence of any basis for concluding that the parties intended to reserve to the grantor the mineral rights in the lands conveyed, or to preclude the United States from enjoyment of such minerals as might be found to exist."

It is true, as petitioner says (p. 17), that the Railroad was the moving party, but it is not reasonable to assume that it desired to give to the Government any greater right or interest in its land than was necessary for the enlarged channel which it sought. Likewise, it is not reasonable to assume that the Secretary of War, in the exercise of his statutory duty of protecting navigation, was endeavoring to secure lands merely as lands, or to obtain any greater right than was necessary for the creation of the new and enlarged waterway. (That the Secretary acted merely under his statutory authority to control and protect navigation is shown by the reference to Section 10 of the Act of March 3, 1899, in the first clause of the permit itself. (R. 162.)) A deed conveying the right to use the land for channel purposes only was entirely sufficient for the purpose both parties had in view and hence the natural presumption is that no greater rights were conveyed. Whether this right amounted to an easement or a limited fee was, as the Circuit Court held, immaterial;

the result was the same. However, the presumption under California law, as well as the facts herein set forth, goes much farther than the Circuit Court found necessary to go, and strongly indicates that what was really intended was only an easement.

Under California Law there is a strong presumption that a grant for purposes of a public "way," whether by land or water, conveys only an easement.* Easements are generally created by dedication, either by grant or by acts *in pais*. That the Railroad Company intended a dedication is evidenced by the original application of that company (and Pacific Dock and Terminal Company, which joined with it). This application dated April 18, 1908 [R. 157], contained the following statements:

> "Your petitioners further represent and show that *they will dedicate*, and *hereby offer to dedicate*, not only *the lands required in the construction of said channels* but, in order to provide for the future improvement of said channels as commercial needs may necessitate, also the following described strips or parcels of land *for use as free, public, navigable waterways.*
>
> "(a) A strip approximately some 7000 feet in length by 400 feet in width . . .
>
> * * * * * * * *
>
> *"Such offers of dedication to be followed by the execution of any further instruments that may be deemed necessary to assure the same, . . ."*

**Wood v. Truckee Turnpike Co.*, 24 Cal. 474, 487; *Wright v. Austin* (1904) 143 Cal. 236, 239, and numerous cases cited therein; *Gurnsey v. Northern Calif. Power Co.* (1911) 160 Cal. 699; *City of Burlingame v. Norbert* (1930) 210 Cal. 105; 4 *Tiffany, Real Property* (3d ed.) § 1112; 18 Corpus Juris, pp. 108-109.

This offer of dedication was transmitted by the United States Engineer to the Chief of Engineers, with a letter of recommendation which contained the following statements [R. 167]:

"2. *It is proposed by the Companies to dedicate to the United States a strip of land 400 feet wide* . . .

* * * * * * * *

"5. As a whole the improvement proposed is an exceptionally good one, substituting as it does for the navigable channel of Cerritos Slough between Long Beach and Wilmington Lagoon a straight strip 400 feet wide, which is to be dredged at once to a depth and width that will make it better suited to the purposes of navigation as carried on at present than is Cerritos Slough itself. Furthermore, it will enable private parties or the Government in the future to make an excellent ship channel without the necessity for buying by special agreement, or through condemnation, land which would be necessary were Cerritos Slough to be improved by widening and straightening without the *dedication* of the 400-foot strip *as proposed* by the San Pedro, Los Angeles & Salt Lake Railroad Co.

* * * * * * * *

"13. I have the honor, therefore, to recommend that the Los Angeles Dock & Terminal Co. and San Pedro, Los Angeles & Salt Lake Railroad Co. be authorized to straighten and widen Cerritos Slough by at once dredging a channel 5 feet deep and at least 40 feet in width, . . . *provided they dedicate a strip 400 feet wide for a ship channel* . . ."

The Chief of Engineers transmitted the application to the Secretary of War, together with his recommendation which contained the following [R. 175]:

> "4. It is therefore recommended that permits *as requested* be granted, as follows:
>
> "(A) To the applicants jointly for the improvement of Cerritos Slough by the excavation of a straight channel as shown on the accompanying map subject to the conditions—
>
> "(a) That a strip of land 200 feet wide on each side of the center line and throughout the length of the proposed channel shall be deeded to the United States free of cost before the work of excavation is begun."

The Secretary of War then issued his permit, which read, in part, as follows [R. 163-4]:

> "NOW, THEREFORE, This is to certify that, *in accordance with the recommendation of the Chief of Engineers,* the Secretary of War hereby gives permission unto the said Los Angeles Dock and Terminal Company and the San Pedro, Los Angeles & Salt Lake Railroad Company, jointly to execute a project for the improvement of Cerritos Slough by the excavation of a straight channel at said place, as shown on said map, subject to the following conditions:
>
> "1.—That a strip of land 200 feet wide on each side of the center line and throughout the length of the proposed channel shall be deeded to the United States, *free of cost,* before the work of excavation is begun. 2.—That the dredged channel shall be at least five (5) feet deep and forty (40) feet wide throughout its length. 3.—That the said channel ***shall be free from tolls.***"

It will be seen that the permit was issued "in accordance with the recommendation of the Chief of Engineers" who, in turn, had recommended that the permit be granted "as requested," thus clearly indicating that the original offer of dedication was accepted.

It is true that the permit contained a condition that a strip of land 200 feet wide "should be deeded to the United States free of cost" but there is nothing in this to show that the deed was to convey anything more than was offered and recommended, to-wit, an easement.

The record shows that the recommendation of the Chief of Engineers and also the permit of the Secretary of War were submitted to and approved by the Judge Advocate General. [R. 162, 174.] Furthermore, the deed was submitted to the United States Attorney, who took an active part in closing the transaction. [R. 285.] If the Secretary of War had intended to reject the offer of dedication and require the conveyance of title in fee simple without restrictions, skilled attorneys for the Government would certainly have included in the permit an express requirement to that effect and would not have accepted deeds expressly limiting the purpose of the grant to the use of a free, public, navigable channel only. The fact is that respondent never has received any notice or intimation prior to the commencement of this action that petitioner needed or desired any greater interest in the premises than an easement for channel purposes. Obviously, for the purposes of a channel petitioner never has needed any greater interest than an easement.

That the deed called for by the permit was intended to convey the proffered easement is further borne out by the provision of the permit "that said channel shall be free

from tolls." If the Secretary of War had intended that the land be conveyed in fee simple, this condition would have been meaningless. The Railroad Company in such case would have had no power to charge tolls on land owned in fee by the United States. This requirement of the permit was given effect in the 1908 and 1918 deeds by the words of the *habendum* clause, which state that the United States is to have and to hold the land for the purposes of a public channel "and subject *for such purposes* to the control, improvement and regulation of said grantee," thus vesting in the United States the power of control and regulation so far as tolls or other interferences with commerce might be involved, a right wholly unnecessary to convey if any estate greater than an easement or a fee limited to the use for channel purposes only had been granted.

Petitioner mentions, as one of the surrounding circumstances indicating a contrary intent from that found by the Circuit Court, that the resolution of the Railroad's board of directors "failed to refer to any reservation of minerals." (p. 18.) The fact is that the Railroad's board of directors were acting upon the understanding that the original offer of dedication had been accepted and that the deed which they were authorizing was being given to assure the dedication. This is clearly indicated by the recitals of the deed which are part of the resolution and which recite that the Railroad Company (jointly with Los Angeles Dock and Terminal Company) had filed an application to improve Cerritos Slough and which state specifically [R. 193]: "Whereas, the said application has been granted," showing unmistakably that the directors understood and believed that the permit was an approval and an acceptance of its original offer of dedication.

Furthermore, the resolution itself specifically sets forth the limitations and conditions which are to be included in the deed. [R. 194-5.] The precise language limiting the use to a "free, public, navigable channel or waterway only" and providing for reverter if the land should be used for "any purposes other than specified" is explicitly set forth in the resolution of the board of directors. In view of these facts, a mineral reservation was obviously superfluous and unnecessary, since no right to take the minerals would pass by such a grant, in any event.

Following the granting of the permit there was an exchange of correspondence extending over a considerable time between respondent and officers of the government in which it is continually stated that the deeds are for "channel purposes" and to convey a "right of way". Among these were:

Letter of transmittal of deed from respondent to Secretary of War, July 10, 1908 [R. 266]:

> "I have the honor to hand you herewith deed from San Pedro, Los Angeles & Salt Lake Railroad Company to the United States of America to a strip of land situated in the City of Long Beach, . . . *for use* by the Government for the construction, maintenance and use *of a free public navigable channel or waterway. This deed is made in pursuance of the requirements of the permit issued by yourself* to the said Railroad Company and to the Los Angeles Dock & Terminal Company, under date of June 11, 1908."

Letter of Captain Fries, U. S. Engineers, to respondent, July 24, 1908 [R. 268]:

> ". . . I return herewith deed from your company to the United States to strip of land in Long Beach *to be used for channel purposes,* . . .
>
> ". . . It is thought that . . . *all conditions should be eliminated* from the deed, but if you insist upon the lines 25-30, page 2, being contained in the deed, I would suggest that they be modified to something similar to the following:" [R. p. 269.]

The objection to the conditions was later withdrawn.

Letter of Captain Stokey, U. S. Engineers, to respondent, August 26, 1910 [R. 283]:

> "I return herewith the deed executed by you July 3, 1908, conveying to the United States *a portion of the right of way for Cerritos Channel,* intended as a substitute for old Cerritos Slough, *to be used for navigation purposes* by connecting Long Beach Harbor with Los Angeles Harbor; . . ." (For the making of certain minor corrections therein.)

Letter of respondent to Captain Stokey, U. S. Engineers, October 19, 1910 [R. 286]:

> ". . . As you probably know, this land is in fact a donation from our company to the Government. *It is not to be used for the erection of any public building, but merely for channel purposes.** and as an abstract would cost in the neighborhood of fifteen hundred to two thousand dollars, we felt that under the circumstances a certificate of title, which is universally accepted in this section of the country, would be as satisfactory as an abstract. . . .

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*Italics are in the original exhibit.

"I have examined the reference to the 25th Statute at Large made by the Attorney General in his letter, but it seems to me the section of the law hardly applies to the situation under consideration. The statute in question states:

" 'That hereafter in the procurement of sites for such *public buildings** it shall be the duty of the Attorney General to require of grantors in each case to furnish, free of all expense to the Government, all requisite abstracts, official certifications, and evidences of title that the Attorney General may deem necessary.'

"You will note that the law in question refers to the procurement of sites for *public buildings, and the deed to the lands in this case limits the use to channel purposes.** This would seem to remove the case from the scope of the section." [R. 286-287.]

Letter of Lieutenant Leeds, U. S. Engineers, to respondent, Feb. 16, 1911 [R. 289]:

"War Department
United States Engineer Office
723 Central Building
Los Angeles, Cal.

February 16, 1911.

"San Pedro, Los Angeles & Salt Lake Railroad Co.,
Pacific Electric Building,
Los Angeles, Calif.

Sirs:

"Referring to your letter of the 10th instant, returning *deeds conveying* to the United States *rights of way for Cerritos Channel* and a channel to be used as a substitute for Dominguez Creek, I have to inform you that I have forwarded the three deeds

to the County Recorder with request that the same be recorded and returned to me.

"In this connection it is noted that the certificate of title returned with the deeds shows clear title up to 8:00 A. M., May 13, 1910. It is requested therefore that you furnish me a statement that no action has been taken which would in any way affect the *title to these rights of way* from the date of the certificate referred to above up to the time the deeds are recorded—probably this date.

Very respectfully,

CHAS. T. LEEDS,
1st Lieut., Corps of Engineers."

Letter of respondent to Lieutenant Leeds, March 1, 1911 [R. 290]:

"Deeds—Cerritos Channel.
Mch. 1st, 1911.

"Hon. Charles T. Leeds,
1st Lieut. Corps of Engineers,
723 Central Bldg., Los Angeles, Cal.

Sir:—

"I have your favor of Feb. 16th, addressed to our Company, and replying to your request, I have to say that no action has been taken by our Company since the date of the certificate, which would in any way affect *title to the rights of way described* in said certificate and *in the deeds* heretofore referred to you.

"Trusting that this will satisfy your wishes, I am,

Yours very truly,

(Signed) A. S. HALSTED,
General Attorney."

The last two letters refer to the actual transmittal and acceptance of the deed. These letters describe the deed as conveying "right of way" for Cerritos Channel and constitute a construction at the very time of the acceptance of the deed that a right of way only was conveyed and also that the grant of a right of way was in full compliance with the permit of the Secretary of War.

Petitioner refers repeatedly (pp. 5, 6, 18, 19) to the quitclaim deeds from the mortgage trustee as containing no mineral reservations and no limitations of use. And, referring to one of them (p. 19, note), petitioner says: "It was this deed which actually conveyed the legal title * * *." That statement is literally true, but possibly misleading. Under the law of California, a trust deed given to secure a debt is, in substance and effect, merely a mortgage with power of sale. The beneficial ownership remains in the trustor and "Except as to the trustees and those holding under them, the trustor or his successor is treated by our law as the holder of the legal title." (*Bank of Italy, etc. v. Bentley,* 217 Cal. 644, 656 (1933); *Ainsa v. Mercantile Trust Co.,* 174 Cal. 504, 510 (1917); *Hollywood Lumber Co. v. Love,* 155 Cal. 270, 273 (1909).)

It follows that the deeds executed by respondent were the effective conveyances, and the quitclaims executed by the trustee operated merely to release the property from the lien of the mortgage bonds. It would appear that counsel for petitioner was aware of this rule of California law. At the bar below, counsel for petitioner in answer to a question from Judge Denman stated unequivocally that petitioner is not claiming herein under the deeds of the trustee.

Coming to the 1918 deed, the petition states (p. 5) that this deed was made pursuant to an appropriation by Congress for improvements of the harbor, such appropriation being upon the condition that "local interests deed to the United States, free of cost, an additional strip of land two hundred feet wide." This statement is incomplete and hence misleading. The Act of Congress specifically provided that the appropriation was to be "subject to the conditions set forth" in House Document 460 [R. 215, *seq.*]. This document is a letter from the Secretary of War to the Speaker of the House of Representatives, transmitting reports of the United States Corps of Engineers describing the work which was to be the basis for the Congressional appropriation. The report states [R. 218]:

> "that local interests will contribute toward the work the sum of $242,300, and deed to the United States, free of cost, an additional strip of land 200 feet wide *alongside the present 400-foot right of way*. . . .
>
> ". . . In connection with its consideration of the subject, the board visited the locality and received assurance from local interests that *the additional strip of land 200 feet wide required for right of way* would be furnished . . ."

This House document constituted a representation by the United States that it owned only a right of way in the 400-foot strip and would require only a right of way for the additional 200 feet. The Act of Congress appropriating funds in 1918 was predicated upon this House document.

That act in part was as follows [R. 227]:

> *"Be it enacted by the Senate and House of Representatives of the United States of America in Con-*

*gress assembled,** That the following sums of money be, and are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, to be immediately available, and to be expended under the direction of the Secretary of War and the supervision of the Chief of Engineers for the construction, completion, repair and preservation of the public works hereinafter named:

* * * * * * * *

"Los Angeles Harbor, California: . . .

"Waterway connecting Long Beach and Los Angeles Harbors, California: Completing improvement *in accordance with the report submitted in House Document Numbered Four hundred and sixty*, Sixty-fourth Congress, first session, and *subject to the conditions set forth in said document*, $130,350."

This was the act of the United States itself. Relying upon these representations and this Act of Congress, respondent executed its second deed covering the additional 200 feet.

While this Act was pending in Congress, respondent addressed a letter to the United States Engineer regarding the terms of the 1918 deed, in which it stated [R. 213]:

> "We assume that a deed in the same form as that used in conveying the original 400 foot strip will be satisfactory. Please advise."

The United States Engineer replied [R. 311] approving this proposal, and stating that the transfer of the land was to be in accordance with House Document No. 460, which was the basis of the Congressional action. This exchange of letters, coupled with this House Document

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*Italics are in original exhibit.

and Act of Congress, demonstrates that the condition of the Congressional appropriation was the grant of an additional right of way. These documents further show that it was the intention of the parties that the 1918 deed should convey the same interest as the 1908 deed, to-wit, a right of way. In other words, the first deed explains and interprets the second deed, and not the second the first, as claimed by petitioner. This evidence further completely disposes of the claim (p. 19) that the phrase in the granting clause of the 1908 deed, "for the construction, maintenance and use of a free public navigable channel or waterway only" must be disregarded from both deeds because it was omitted from the granting clause of the second deed. Whatever may have been the cause of its omission from the second deed, the fact is clear that it was understood by both parties that the first deed conveyed only a right of way and that the additional 200 feet was required solely for right of way purposes.

Subsequently, in House Document 1013 [R. 317] the 600 foot channel is described as "the present 600-foot right of way." In Senate Document 130, dated April 21, 1930 [R. 334] it is stated:

> "The Federal Government *has an easement over a strip* 600 *feet wide*. Harbor lines have not yet been established but *the easement was granted* with the idea that pierhead lines would be established 600 feet apart. . . ."

On July 3, 1930, another Act of Congress was passed [R. 337] appropriating further funds for the improvement of this channel "in accordance with the plans recommended in the reports hereinafter designated." One of these reports is Senate Document 130 above mentioned. Again,

as late as August 18, 1934 in a report contained in Senate Committee Print, 74th Congress [R. 344] it is stated that

> "The act of July 18, 1918, in making appropriations for this channel . . . provides that local interests shall deed to the United States free of cost an additional strip of land 200 feet wide alongside the present 400-foot wide right-of-way."

The trial judge in his oral decision brushed aside all the above evidence by saying [R. 503, 504] that these contemporaneous and subsequent interpretations were not by the government "but by subordinates whom I thought used such references more for private purposes." The above record contradicts this statement squarely and shows that the government itself acting not only through its Chief of Engineers and its Secretary of War, but in its sovereign capacity through acts of Congress, over a period of twenty-five years construed the government's title to this channel as an easement and so represented to respondent. It should not now be heard in equity to claim any greater estate.*

It is respectfully submitted that the evidence above outlined demonstrates that whatever may have been the technical estate conveyed by the deeds, neither party ever intended that the United States should have the right to use said lands for any other purpose than a free, public, navigable channel and that all other uses are therefore forbidden. It follows that if the Circuit Court had resorted to the extraneous evidence its decision as to the intent of the parties would have been the same as that which it found to have been expressed by the language used in the deeds.

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*See *Parish of Jefferson v. Texas Co.*, 189 So. 580, 590, Cer. Den. 308 U.S. 601.

APPENDIX "B."

Excerpt from Statutes of California, 1911, Page 1304.

"Section 1. There is hereby granted to the City of Long Beach, a municipal corporation of the State of California, and to its successors, all the right, title and interest of the State of California, held by said state by virtue of its sovereignty, in and to all the tide lands and submerged lands, whether filled or unfilled, within the present boundaries of said city, and situated below the line of mean high tide of the Pacific ocean, or of any harbor, estuary, bay or inlet within said boundaries, to be forever held by said city, and by its successors, in trust for the uses and purposes, and upon the express conditions following, to-wit:

"(a) That said lands shall be used by said city and by its successors, solely for the establishment, improvement and conduct of a harbor, and for the construction, maintenance and operation thereon of wharves, docks, piers, slips, quays and other utilities, structures and appliances necessary or convenient for the promotion and accommodation of commerce and navigation, and said city, or its successors, shall not at anytime, grant, convey, give or alien said lands, or any part thereof, to any individual, firm or corporation for any purpose whatsoever; provided, that said city, or its successors, may grant franchises thereon, for limited periods, for wharves and other public uses and purposes, and may lease said lands, or any part thereof, for limited periods, for purposes consistent with the trusts upon which said lands are held by the State of California and with the requirements of commerce or navigation at said harbor; . . ."